



be denied, though, because Defendants are unable to establish the statutory prerequisites for such certification, as Plaintiffs outline here.

28 U.S.C. section 1292 allows for a district court to certify an interlocutory order for immediate appeal if (1) the order involves a controlling question of law, (2) that is subject to a substantial ground for difference of opinion, when (3) an immediate appeal may materially advance the termination of the litigation. 28 U.S.C. § 1292(b). None of these factors are satisfied by the orders at issue here.

A controlling question of law must be just that—a question of law. 1292(b) certification is not available when the question is the application of the law to the facts; that is, “28 U.S.C. § 1292(b) ‘is not available as a means to review . . . for incorrect evaluation of proper factors.’” *See Totonelly v. Cardiology Assocs.*, 936 F. Supp. 165, 167 (D.N.Y. 1996) (quoting *A. Olinick & Sons v. Dempster Brothers, Inc.*, 365 F.2d 439, 443 (2d Cir. 1966)). Here, Defendants merely disagree with the Court’s analysis, not whether the Court applied the correct law. This is not a proper basis for finding a controlling question of law.

In addition, the question is not a question of law when it is essentially a question of the evidence presented to the Court and the facts upon which the ruling lies. That is, plainly, “28 U.S.C. § 1292(b) is not designed for review of factual matters but addresses itself to a ‘controlling question of law.’” *Link v. Mercedes-Benz of N. Am., Inc.*, 550 F.2d 860, 863 (3<sup>rd</sup> Cir. 1977). As a result, “[a] question which requires a factual as well as legal decision is not suitable for interlocutory review.” *Speizman Knitting Machine Co. v. Terrot Strickmaschinen GmbH*, 505 F. Supp. 200, 202 (D.N.C. 1981).

As can be seen by a review of Defendants' Motion for Certification, much of their argument is based on an their alternative view of the evidence presented to the Court and the claim that the Court is simply wrong on the evidence. Thus, Defendants posit a ruling that is fundamentally a question of the evidence presented, not a question of law. It is no answer that the question is one of Mexican law. Here, Mexican law is the "fact" at issue and the Court's resolution of that fact is based on the evidence and the record presented by the parties. This is not a "controlling issue of law" as contemplated by section 1292(b), but rather is simply the Court's conclusion based on the evidence presented. Thus, "an appeal would necessarily present a mixed question of law and fact, not a controlling issue of pure law," and the issues are not suitable for certification. *See SEC v. First Jersey Secur., Inc.*, 587 F. Supp. 535, 536 (D.N.Y. 1984).

Secondly, Defendants must show a "substantial" ground for disagreement about the controlling question of law. As shown above, there is no controlling question of law here. Likewise, there is no basis for a "substantial" basis for disagreement. Defendant, of course, disagree with the Court's ruling. But merely because they disagree does not make a "substantial" ground. Defendant do not contend that the Court failed to follow the appropriate precedent or apply the proper factors. They merely contend that the Court's ruling is erroneous. This is not enough to justify the exceptional step of certifying the ruling for appeal. *See Totonelly*, 936 F. Supp. at 167

Finally, Defendants must show that an immediate appeal would advance the termination of the litigation. This they cannot do. They merely ask that the Court send the litigation to another forum. The ruling on these motions is *not* dispositive. Reversal by the

Court of Appeals would not *end* the litigation but would instead require the case to continue in another forum. *See Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co.*, 198 F. Supp. 284, 286 (D.N.Y. 1961) (denying motion for certification on order on venue because no indication appeal would advance termination of the litigation). As a result, an immediate appeal would not advance the termination of the litigation, but would only serve to delay the case.

In the final analysis, Defendants merely disagree with the Court's ruling. As shown by the prior and extensive briefing on the issues, the Court's ruling is entirely correct. Defendants can present no change that has occurred since the ruling to justify any expectation that the Court of Appeals would find any error in the Court's ruling. As a result, Defendants' motion for certification is without merit and should be denied.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Plaintiffs' Response to Defendants' Motion for Certification Pursuant to 28 U.S.C. § 1292(b) has been served upon all counsel listed below via email on April 18, 2006.

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